IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.* Plaintiffs, vs. TYSON FOODS, INC., *et al.* Defendants.	Case No. 05CV0329-GKF-PJC

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* PERTAINING TO EVIDENCE OR ARGUMENT ABOUT ANY ALLEGED IMPROPRIETY OF SUING THESE DEFENDANTS WITHOUT SUING ALL OTHER SOURCES OF POLLUTION [DKT. #2429]

Defendants respectfully submit this Joint Response in Opposition to Plaintiffs' Motion *in Limine* seeking an order precluding Defendants from making any argument, doing any questioning or proffering any evidence regarding the impropriety of suing these Defendants without suing all sources of alleged pollution in the Illinois River Watershed. Such evidence is relevant and probative, and is not confusing, misleading, or unfairly prejudicial. Accordingly, Plaintiffs' Motion should be denied.

I. INTRODUCTION

Plaintiffs argue that evidence of their failure to address all alleged sources of pollution from the chemical constituents by which they claim they are injured lacks relevance and is misleading, and thus seek to bar such evidence from trial. [Dkt. #2429, pp. 3-4] Plaintiffs further claim that they have "prosecutor's discretion" to pick and choose against whom they may proceed in Court to redress the alleged injury to the Illinois River Watershed. *Id.* at 2-4.

Defendants deny that Plaintiffs are "prosecutors" in this case, as this is a civil case and not a criminal one, despite Plaintiffs citation of non-environmental criminal cases in support of their position. See, e.g., *United States v. Oldbear*, 568 F.3d 814 (10th Cir. 2009); *United States v. Jordan*, 485 F.3d 1214 (10th Cir. 2007) (both cited at Dkt. #2429, p. 3). Nevertheless, while this Court or a trier-of-fact may ultimately determine that Plaintiffs have some type of discretion to pursue one alleged source of injury to the exclusion of others, that proposition does not *ipso facto* lead to a conclusion that evidence of third-party sources of the very chemical constituents from which Plaintiffs claim injury and whom they chose not to pursue or otherwise address is irrelevant. To the contrary, evidence of all sources of the alleged injuries is vital to any determination of causation and remedy in this case. The subject evidence is relevant to Plaintiffs' inability to prove that poultry litter, as opposed to some other source, is responsible for alleged pollution of the waters of the Illinois River Watershed, and is therefore admissible under Federal Rules of Evidence 401 and 402. Moreover, evidence of other sources is also relevant to, *inter alia*, contribution by Plaintiffs and potentially joint and several considerations for certain counts, and bears upon the Court's determinations regarding injunctive relief. Plaintiffs' motions should therefore be denied.

II. DISCUSSION

Evidence is considered relevant to the extent that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Relevant evidence is generally admissible. Fed. R. Evid. 402. "'The determination of whether the evidence is relevant is a matter within the sound discretion of the trial court.'" *Gomez v. Martin Marietta*

Corp., 50 F.3d 1511, 1518 (10th Cir. 1995) (quoting *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 566 (10th Cir. 1978)).

Plaintiffs seek to exclude as irrelevant any discussion of alternate sources of alleged pollution. [Dkt. No. 2429 at 3-4]. However, evidence of all sources of the alleged pollution in the Illinois River Watershed is relevant to causation. Causation is a necessary element of any tort claim, including the torts of nuisance and trespass. *See Twyman v. GHK Corp.*, 93 P.3d 51, 54 n. 4 (Okla. Civ. App. 2004); *Angell v. Polaris Prod. Corp.*, 280 Fed. Appx. 74, 2008 U.S. App. LEXIS 12007 (10th Cir. June 4, 2008). Plaintiffs must show that Defendants' actions caused the injury of which they complain:

> In all tort cases, the plaintiff must prove that each defendant's conduct was an actual cause, also known as cause-in-fact, of the plaintiff's injury: Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought.

City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 113-14 (Mo. 2007); *see also* Defendants' Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6, and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability Under Counts 4, 6, and 10 ("Causation Motion"), Dkt. #2069.

As the Court itself previously recognized, both sorts of evidence that Plaintiffs seek to exclude are directly relevant to a central disputed fact, specifically whether alleged pollutants can be traced back to poultry litter. *See* Opinion & Order, Dkt. No. 1765, at 1-2, 7 (Sept. 29, 2008). As the Tenth Circuit noted, it is "undisputed that humans, various wildlife, and numerous farm animals, including pigs, sheep, and cattle, rely on IRW lands and waterways, and harbor the various bacteria at issue in this case." *Attorney General of the State of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 778 (10th Cir. 2009). Evidence establishing that Plaintiffs have not

seen fit to address other sources of the very same constituents which form the basis of their allegations against the Defendants – and are allowing those sources to continue unabated and unimpeded – is certainly relevant to the determination of causation.

Moreover, the evidence is relevant to the issue of injunctive relief. Because "[a]n injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable,'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)), evidence regarding other contributors of alleged pollutants in the Illinois River Watershed is relevant to determining whether the harm is irreparable. Indeed, as the Tenth Circuit noted, Plaintiffs' failure at the preliminary injunction hearing to "establish that poultry litter was a contributing source of the IRW bacteria, [and to] account for these alternative sources of bacteria … clearly left the district court with doubt about the potential ameliorating effects of a preliminary injunction." *Tyson Foods*, 565 F.3d at 778. The evidence Plaintiffs now seek to exclude may properly elicit similar doubts at trial. In fact, Plaintiffs' failure to pursue or address other sources of the alleged pollutants in the Illinois River Watershed is relevant to equitable defenses pled by Defendants, such as laches, estoppel, and unclean hands.

Plaintiffs cite three cases in their Motion *in Limine* on this topic in support of their argument that Plaintiffs' purported discretion to address alleged pollution in piecemeal fashion equates to a bar on Defendants' ability to put on evidence of other sources Plaintiffs have failed to pursue or otherwise address: *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); and *American Canoe Assn. v. Murphy Farms, Inc.*, 326 F.3d 505 (4th Cir. 2003). None of these cases stands for the conclusion that evidence of

other sources of alleged pollution is barred based on whatever discretion a plaintiff might have to pick-and-choose to sue whomever it likes.

In *Massachusetts v. EPA,* the United States Supreme Court was confronted with a case in which the Environmental Protection Agency was sued for failing to regulate greenhouse gas emissions from motor vehicles. 549 U.S. 497, 524. The EPA maintained that, as the responsible regulatory agency, it did not have to regulate all sources of greenhouse gases. EPA further maintained that the greenhouse gases from motor vehicle emissions contributed so insignificantly to the plaintiff's alleged injuries that EPA could not be haled into federal court to answer for its regulatory decision in that regard. *Id.* at 524. The Supreme Court disagreed, and held that the "EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a judicial forum. Yet accepting that premise would doom most challenges to regulatory action." *Id.*

Thus, the court in *Massachusetts v. EPA* did ***not*** find that the plaintiffs were barred from challenging the EPA's decision to pick and choose which causative aspects of the plaintiff's alleged injury would be regulated and which would not. The plaintiff was allowed to use its evidence of the EPA's failure to regulate some types of emissions which allegedly caused some or all of the plaintiff's injuries. Similarly, Plaintiffs in this case claim that they have a right to pursue whomever they choose, and that other sources of the alleged constituents of harm are small in comparison to the source pursued in this litigation. This is the same position taken by EPA in the cited case. As the Supreme Court found in that case, however, such a position does not bar evidence of selective regulation (or in this case, regulation by selective litigation, as the State has already regulated poultry litter applications for a number of years).

Likewise, the Supreme Court in *Williamson* did ***not*** bar the introduction of such evidence. In that case, the plaintiff sued because some aspects of visual or optical care were regulated by the state while others were not. The plaintiff sought to have the statutory scheme for visual care declared unconstitutional. The Supreme Court merely held that it was for the legislature and not the courts to balance the advantages and disadvantages of regulating visual care, and that so long as there was a rational reason to regulate the activity that did not otherwise run afoul of the U.S. Constitution. 348 U.S. 483, 487-88. The Court stated that if a person disliked the legislative outcome, the remedy was at the polls, not in the courts. *Id.* at 488. Defendants in this case agree, and one aspect of the defense in this case is that the legislatures in Oklahoma and Arkansas extensively regulate the very activity complained of by Plaintiffs in this lawsuit, which seeks to have the Court overturn the constitutional legislative and regulatory judgments of two sovereign states. Be that as it may, the *Williamson* case does ***not*** stand for the concept that evidence that Plaintiffs have failed to pursue all sources of their alleged injuries is barred at trial.

Finally, Plaintiffs cite the *Murphy Farms* case in support of their demand that this Court bar evidence that Plaintiffs have failed to pursue all sources of their alleged injuries. In *Murphy Farms*, the Fourth Circuit Court of Appeals was reviewing an appeal of, among many other things, a finding that the plaintiffs, who were a number of environmental groups, had standing to sue under the Clean Water Act. 326 F.3d 505, 520. Murphy Farms challenged the trial court's finding of standing by the plaintiffs under the Clean Water Act, as interpreted by the Fourth Circuit. *Id.* The Fourth Circuit had previously found that a plaintiff did not have to demonstrate a strict "but-for" test to have standing (i.e. the specific defendant's conduct, and that conduct alone, caused the plaintiff's injury). *See Natural Resources Defense Council v. Watkins*, 954

F.2d 974, 980 (4th Cir. 1992). Rather, the Fourth Circuit adopted a "fairly traceable" standard for determining standing, and held that the plaintiffs had standing if they could show the defendant's conduct contributes to the plaintiff's alleged injury. This is not a causation standard, but merely a standard to determine standing under the Clean Water Act. *Id.* In Murphy, the Fourth Circuit Court of Appeals merely reiterated that standard and found that the plaintiffs in that case did have standing to sue Murphy Farms under the Clean Water Act, and that the trial court therefore did not err on that issue. None of this has any remote connection to the issue of whether a defendant can put on evidence at trial that the plaintiffs are not pursuing all sources of their alleged injuries.

As the Court can plainly see, Plaintiffs have not offered a single case, statute or regulation that actually bars introduction of the evidence they seek to prohibit by way of the subject Motion *in Limine.* To the contrary, at least one of the cases they cite actually supports the introduction of such evidence as part of a challenge to the legitimacy of regulatory action. *Massachusetts v. EPA*, 549 U.S. 497 (2007). In fact, a defendant is allowed to put on evidence of other possible causes of a plaintiff's injury as part of the defendant's proof or defense that the defendant's conduct is not the legal cause of the plaintiff's injury. *See, e.g., Microstrategy, Inc. v. Business Objects, S.A.*, 429 F.3d 1344 (2005); *York v. AT&T*, 95 F.3d 948 (10th Cir. 1996); *Practice Guide to Am. Jur.* 441 (2009). Moreover, these other causes need not be proved with certainty, or more probably than not. *Id.*

In summary, Plaintiffs have failed to demonstrate any support for the notion that this Court should bar the introduction of evidence concerning Plaintiffs' selective pursuit of parties from whom it seeks to recover for alleged injuries to the IRW. The introduction of such evidence is relevant, reasonable and appropriate under Rules 401 and 402 of the Federal Rules of

Evidence and under the general notions of causation and injunction. Accordingly, the Court should deny the subject Motion *in Limine.*

III. CONCLUSION

For the stated reasons, the Court should deny Plaintiffs' Motion *in Limine* seeking an Order precluding Defendants from making any argument, doing any questioning or proffering any evidence regarding the impropriety of suing these Defendants without suing all sources of alleged pollution in the Illinois River Watershed, and Defendants further pray for any and all other relief to which they may be entitled.

Respectfully submitted,

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